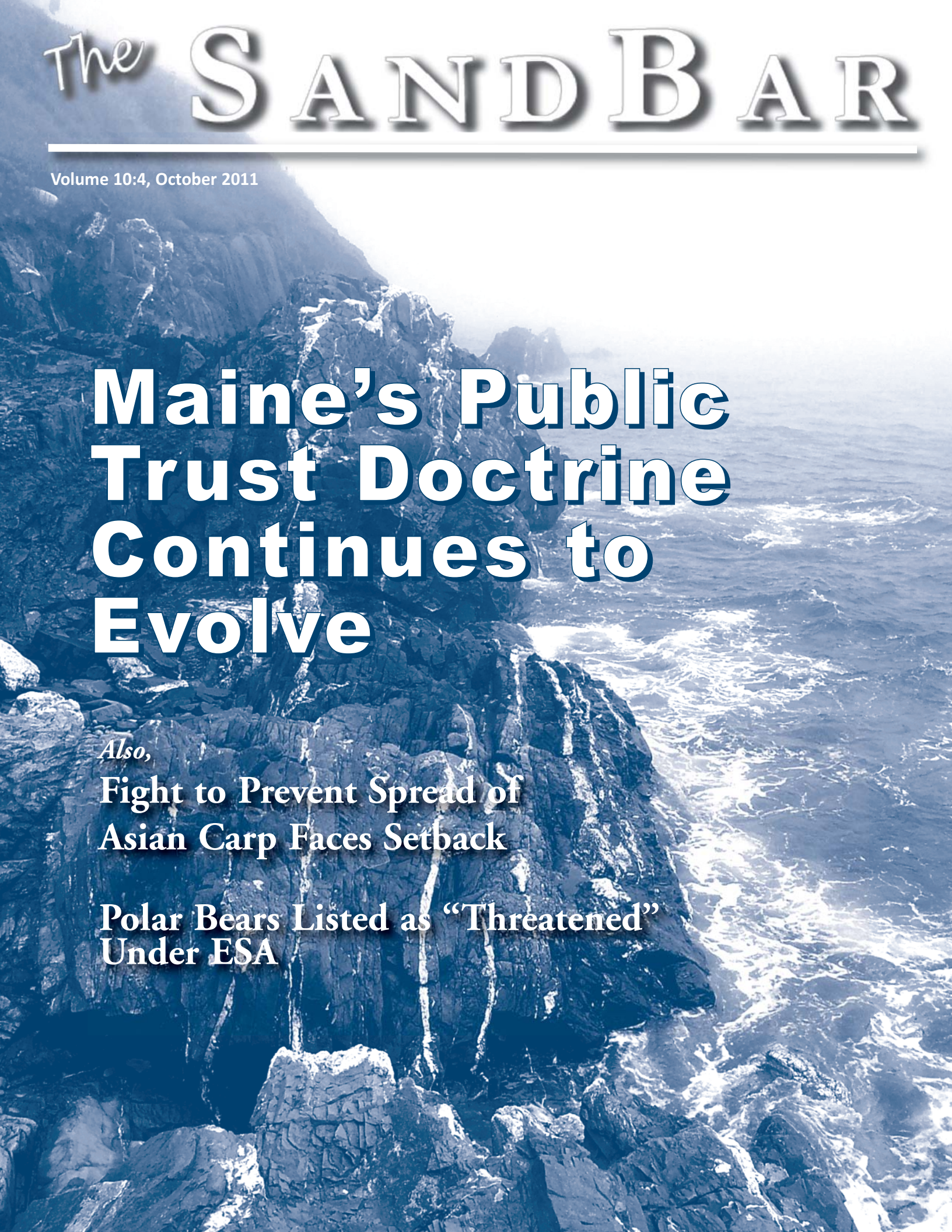
The SandBar

Volume 10:4, October 2011



Maine's Public Trust Doctrine Continues to Evolve

Also,

Fight to Prevent Spread of Asian Carp Faces Setback

Polar Bears Listed as "Threatened" Under ESA

From the Editor

Following Hurricane Irene and Tropical Storm Lee, flooding hit several east coast states hard. Our thoughts are with flood victims in those states. Many legal clinics at law schools in those states are stepping in to assist residents with FEMA information, insurance claims, and other property damage-related help. On a policy level, the resulting devastation highlights the need to keep working for more sustainable land use plans, incentives, and regulations.

While this issue of *The SandBar* will not address flooding issues, we do take a look at other pressing ocean and coastal law topics. In Maine, the state supreme court reexamined coastal access rights in the state. A previous state court case had limited the public's right to use intertidal land to the activities of "fishing," "fowling," and "navigation." The most recent decision, holding that scuba divers could cross intertidal lands, may mark a shift to expand public access rights in the state.

Other articles in this issue provide an update on litigation over attempts to halt the spread of Asian carp in the Great Lakes and the polar bears' status under the ESA. At the end of this issue, we have provided an index for volume 10 of *The SandBar*. All past articles are archived online.

As always, thanks for reading *The SandBar*!

Terra

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Sea Grant Law Center, Kinard Hall, Wing E, Room 258, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu . We welcome suggestions for topics you would like to see covered in *The SandBar*.

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Cover and contents page photographs of West Quoddy Head, Maine, courtesy of NOAA. Cover photographer is Captain Albert E. Theberge, NOAA Corps (ret.), contents page photographer is Michael Theberge, Maine Maritime Academy.

The SandBar

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MAINE'S PUBLIC TRUST DOCTRINE CONTINUES TO EVOLVE

Evan Parrott, 2013 J.D. Candidate, Univ. of Mississippi School of Law

Photograph of Maine coastline courtesy of NOAA.

In a recent ruling, the Maine Supreme Judicial Court affirmed a summary judgment holding that the public has a right to walk across intertidal lands to reach the ocean for purposes of scuba diving.[1] The decision, which recognized the evolution of common law, opens the door for further expansion of public trust rights in Maine.

Maine's Public Trust Doctrine

The public trust doctrine is a principle of common law declaring that the state holds title to submerged land under navigable waters in trust for the benefit of the public. Each state's law regarding intertidal land (land between the mean low-water mark and the mean high-water mark) has developed independently. As a result, the extent of the rights of the public to reach the ocean differs from state to state. The common law of the states has adapted over time to reflect the changes in the ways people use and access the ocean.

In Maine, "the upland owner ordinarily has fee ownership of the intertidal land, and that private ownership is subject to the public's right to use the intertidal zone."[2] The state owns the land below the mean low water mark and reserves it for public use. The dry upland side, on the other hand, belongs to individual owners, who hold fee title. However, those lands, like all intertidal lands, are subject to public trust rights that originated in early English law.

In several New England states such as Massachusetts and Maine, colonial ordinances from the 17th century continue to influence laws regarding intertidal regions. In these states, the public trust rights generally include activities that involve economic dependence on the sea. The foundation of intertidal land ownership in Maine is the Massachusetts Bay Colony's Colonial Ordinance of 1647. The Colonial Ordinance allowed private ownership of intertidal lands, while still recognizing the rights of the public to use the lands. However, the ordinance "expressly referred to those rights as connected to 'fishing,' 'fowling,' and the passage of boats and vessels, which was later summarized as 'navigation.'"[3] Massachusetts incorporated the ordinance's concept of private intertidal ownership into its common law in 1810. When Maine achieved statehood in 1820 and separated from Massachusetts, "the Maine Constitution incorporated Massachusetts common law into Maine law."[4]

The Maine Supreme Judicial Court has continually altered common law regarding the public trust rights in intertidal land to reflect the realities of use in each time period. Until the recent decision of *Bell v. Town of Wells*,[5] "the common law developed along lines that were generous to the public, but continued to balance that expansive approach against the upland owners' rights."[6] While the court's opinion in *Bell* was pending, Maine enacted The Public Trust in Intertidal Land Act, which added recreational uses to fishing, fowling, and navigation. The court held that the act was unconstitutional and public trust rights to intertidal lands did not include a general recreation easement, notwithstanding previously recognized common law activities that were not included in the three enumerated uses of fishing, fowling or navigation.[7]

Background

In the present case, William A. McGarvey Jr. and Mary Jo Kleintop are owners of oceanfront property on Passamaquoddy Bay in the City of Eastport, Maine. Steven R. Whittredge and Jonathan Bird's property is bounded to the south and east by McGarvey's property. The result of the configuration of property lines is that McGarvey's intertidal region separates Whittredge's upland property from the ocean.

Whittredge operates a commercial scuba diving business that requires him to take clients on shore dives in Passamaquoddy Bay. For Whittredge and his clients to reach the ocean, they must walk their scuba equipment across McGarvey's intertidal land to enter the Bay. The dives do not involve the use of a boat, and no one engages in any form of fishing or fowling.

In November 2008, McGarvey filed an action seeking an injunction prohibiting Whittredge from crossing the intertidal land for scuba diving. Whittredge counterclaimed seeking a judgment declaring his use of the land as lawful. In January 2010, the court granted a summary judgment in favor of Whittredge, declaring that crossing the "intertidal land to access the water for recreational or commercial scuba diving is within the public's right to use intertidal land for navigation."[8] McGarvey then appealed the court's summary judgment.

Use of Intertidal Lands for Scuba Diving

In evaluating McGarvey's claims, the court accepted the *Bell* court's decision not to extend the public rights in intertidal zones to include a general recreational easement. Instead, the court turned to the narrow issue of "whether in the context of Maine's common law . . . the public has a right to cross the intertidal portion of the beach on the private owner's property to reach the ocean to scuba dive."[9] The court refused to address the broader issue of "whether the public trust rights include a general, or more limited, recreational easement to use . . . intertidal lands."[10]

In its analysis, the court used a two-part test. The first part consisted of deciding whether the intended activity falls within the *Bell* categories of "fishing," "fowling," or "navigation." If not, the court would then decide whether the common law should be understood to include that activity. If the court's answer to both questions was no, the activity would not be included in the public rights to use intertidal land. In its application of the test, the court declined to extend the definition of navigation to include scuba diving. Therefore, the issue came down to the second part of the test: should the common law be understood to include scuba diving? The court answered this question in the affirmative, stating that although it is not expressly stated in any one opinion, the "common law has regularly accommodated the public's right to cross the intertidal land to reach the ocean for ocean-based activities."[11]

The court stated that despite the appearance in *Bell* that the activities allowed are set in stone, the public trust rights in the intertidal zone have never been enumerated.[12] The court also stressed the importance of the flexibility of common law, and its ability to give "expression to changing customs and sentiments of the people."[13] The court cited how the history of decisions regarding intertidal land long before *Bell* emphasized the point that "the public's use of the intertidal zone was not so severely limited that only a person with a fishing rod, a gun, or a boat could walk upon that land."[14] In the end, the court decided that the three terms "fishing," "fowling," and "navigation" provide context, but do not exclusively define the public trust rights, therefore affirming the summary judgment.[15] In a separate concurrence, three justices reached the same conclusion, but based their decision extending the definition of "navigation" to include scuba diving.[16]

Conclusion

The Maine Supreme Judicial Court found that scuba diving should be included in the common law right of the public to walk across another person's intertidal land.[17] The court decided that it is irrelevant whether the activity fell under one of the traditional categories of "fishing," "fowling," or "navigation." Instead, the court balanced the reasonable interests of private ownership of the intertidal lands and the public's use of those lands. While the decision was narrow, the court opened the door for further expansion of the public trust doctrine in Maine.

Endnotes

1. *McGarvey v. Whittredge*, No. WAS-10-83, 2011 WL 3715696 (Me. Aug. 25, 2011).
2. *Id.* at *4.
3. *Id.* at *15.
4. *Id.* at *17.
5. 557 A.2d 168 (Me. 1989).
6. *McGarvey,* at *23.
7. *Id.* at *25.
8. *Id.* at *3.
9. *Id.* at *26.
10. *Id.*
11. *Id.* at *27.
12. *Id.* at *28.
13. *Id.* at *29 (citing *State v. Bradbury*, 136 Me. 347, 349 (1939)).
14. *Id.*
15. *Id.* at *31.
16. *Id.* at *41-5.
17. *Id.* at *31.

Fight to Prevent Spread of Asian Carp Faces Setback

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On August 24, 2011, the Seventh Circuit Court of Appeals upheld the denial of a request by Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin to compel the U.S. Army Corps of Engineers and Chicago's Municipal Water Reclamation District to close the locks on the Chicago Area Waterway System and prevent the spread of Asian carp into Lake Michigan.[1]

Background

Early wastewater systems discharged municipal sewage into the Chicago River, which ultimately drained into Lake Michigan. The Chicago Sanitary and Ship Canal, a series of locks constructed in 1900, reversed the river's flow to prevent storms from washing mass quantities of sewage into Lake Michigan. The Canal (part of the Chicago Area Waterway System) currently exists as the sole navigation canal between the Mississippi River Watershed and the Great Lakes.[2]

The Bighead and Silver carp, collectively referred to as Asian carp, are invasive fish species introduced to catfish farms in the southern United States in 1970 to combat algae growth. Soon after importation, Asian carp escaped containment and entered the Mississippi River Watershed. They continued to migrate northward and recently approached the Chicago Area Waterway System (CAWS). Should Asian carp successfully cross the CAWS and enter Lake Michigan, the Great Lakes' fisheries risk potentially irreparable damage. The last line of defense along the CAWS is the O'Brien Lock and Dam, and its closure is at the heart of the dispute.

In the late 2000s, the U.S. Army Corps of Engineers (the Corps) acknowledged the proximity of Asian carp to the CAWS and created an ongoing, multi-agency federal effort to address migration, including a 5-year, $25 million study. The Corps implemented an electric barrier fence and other measures along the Canal to prevent further migration of Asian carp.[3]

A Brief Litigation History

In December 2009, Michigan's Attorney General filed a lawsuit before the U.S. Supreme Court, attempting to reopen the 1929 case *Wisconsin v. Illinois*, a case in which the Supreme Court ordered the CAWS to remain open.[4] Michigan alleged that despite this ruling, the CAWS now constitutes a public nuisance and threatens the Great Lakes' $7 billion fishing industry. The State of Illinois opposed the CAWS closure, as closure would upset millions of tons of cargo movement. Several attempts to request the Supreme Court revisit the case ensued, and each time the Court refused to hear the case and issue a preliminary injunction to close the CAWS locks.[5]

On July 19, 2010, the states of Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin filed a lawsuit against the Corps and Chicago's Municipal Water Reclamation District in the United States District Court for the Northern District of Illinois. The complaint alleged that the Corps and the District created a public nuisance by allowing Asian carp to threaten the waters and fisheries of the Great Lakes.[6] The States asked the court to issue both a preliminary and permanent injunction compelling the Corps and the District to "take all available measures, consistent with the protection of public health and safety, to prevent the emigration of Asian [c]arp through the CAWS into Lake Michigan."[7] The measures requested include use of the "best available

measures to block the passage of, capture, or kill bighead or silver carp that may be present" in the CAWS. The complaint also requested the court review the Corps' response actions pursuant to the Administrative Procedure Act.[8]

Although the States proposed several alternatives, including installation of permanent grates, nets, bulkheads, and the use of fish-killing chemicals, the most controversial option was the closure of the O'Brien Lock and Dam – the sole navigation canal between the Chicago River and Lake Michigan. Shortly after filing the lawsuit, the City of Chicago, The Coalition to Save Our Waterways and the Wendella Sightseeing Company joined the litigation, alleging that they would suffer great harm should the court order the O'Brien Lock's closure.

The District Court heard arguments in late Fall 2010 and released an opinion on December 2, 2010, denying the States' motion for a preliminary injunction. The court held that the Corps' ongoing preventative work on Asian carp migration was sufficient at the time to reduce the risk of Asian carp spreading into Lake Michigan.

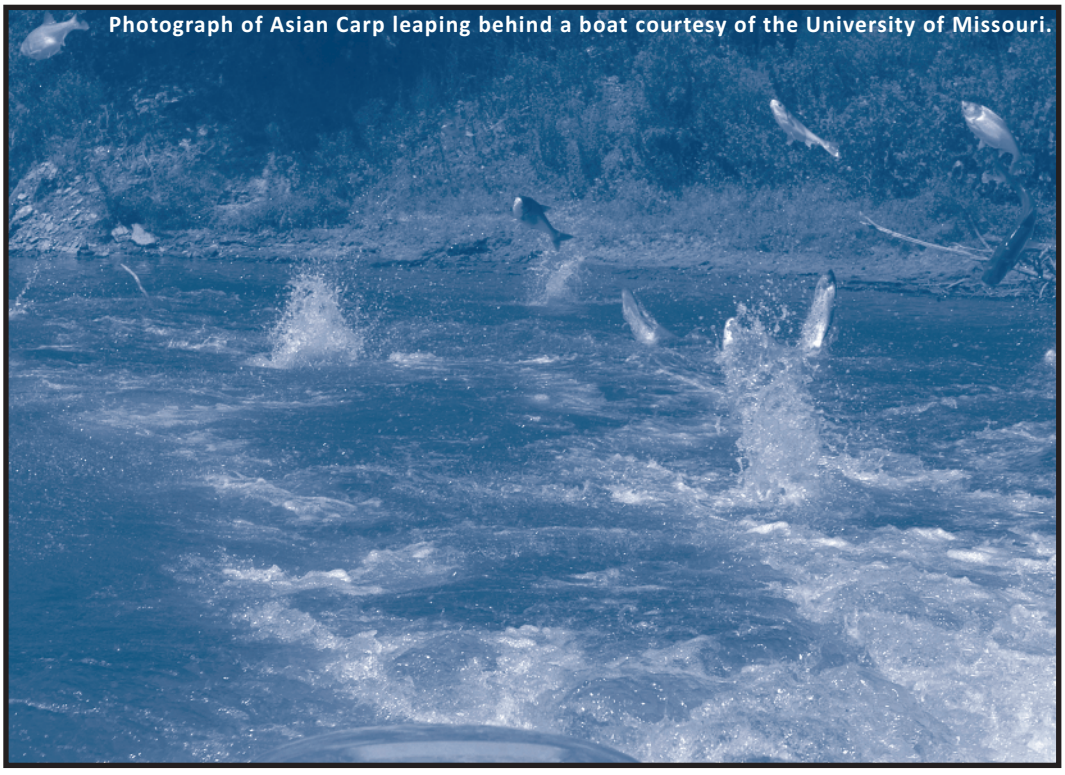
Federal Appeals Court

After the District Court decision, the States filed an appeal with the United States Court of Appeals for the Seventh Circuit. The appellate court held that there was insufficient information to reverse the district court's denial of the preliminary injunction; however, the court went on to state that the district court underestimated the merits of the public nuisance claim.

The Seventh Circuit held that the States could seek relief for the Asian carp threat under federal common law of public nuisance; however, the Corps asserted that no basis exists for public nuisance actions against federal agencies. The court addressed this issue by citing that states may bring public nuisance actions against *other* states under federal common law and the Supreme Court has not "expressly authorized a public nuisance claim against the United States."[9] This opened the possibility that the public nuisance claim may proceed against the federal government.[10] Additionally, the court held that the Corps could not claim sovereign immunity, as the APA allows for judicial review of federal agency actions. In light of new evidence suggesting that Asian carp may establish breeding populations, the Seventh Circuit expressed greater concern than the district court of the Asian carp threat to the Great Lakes. The court concluded "the plaintiffs presented enough evidence at this preliminary stage of the case to establish a good or perhaps even a substantial likelihood of harm – that is, a non-trivial chance that the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance. If the invasion comes to pass, there is little doubt that the harm to the plaintiff states would be irreparable."[11]

Despite new evidence, the Seventh Circuit ultimately relied on the ongoing, multi-agency effort as the best possible solution to the crisis. Rather than grant the States an immediate injunction closing the CAWS, the court opted to give the government a reasonable chance to address the problem. The court

See Asian Carp, p. 10



Photograph of Asian Carp leaping behind a boat courtesy of the University of Missouri.

Polar Bears Listed as "Threatened" under ESA

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A recent district court decision upheld the Fish and Wildlife Service's "threatened" listing for polar bears under the Endangered Species Act (ESA). In designating the polar bear as threatened, FWS noted that, due to increased Arctic temperatures, the bear's sea ice habitat is diminishing and, thus, in the reasonably foreseeable future, the polar bear stands to become endangered.[1] Following the listing, various groups opposed the threatened status, with many environmental organizations contending that FWS failed to offer the polar bear enough protection, and many institutions claiming that insufficient evidence existed to justify any protections being extended to the polar bear at all. Regardless of the plaintiffs' stance on the issue, the lawsuit challenged the listing as arbitrary, capricious, and an abuse of agency discretion under the Administrative Procedure Act (APA). In reviewing these arguments, the District Court for the District of Columbia determined that FWS, in listing the polar bear as threatened, did not act in an arbitrary or capricious manner and upheld FWS's rulemaking as a valid exercise of agency authority.

Background

In 2005, the Center of Biological Diversity requested that FWS designate polar bears as a threatened species under the ESA.[2] Entirely reliant on sea ice for their survival, polar bears face a diminishing habitat which traditionally provides access to their main food source (ice-dependant seals) and a means of travelling between seaward feeding areas and their maternity dens on land. In 2007, FWS issued a proposed rule designating the polar bear as threatened throughout its range, and in May 2008, the agency issued a final rule to that same effect.

In the listing rule, FWS noted that, even in winter, the amount of sea ice had declined significantly within the polar bear range. Attributing the decline to greenhouse gas emissions and atmospheric changes, FWS concluded that, in fifty years, the polar bear's habitat would be extensively reduced. With a dwindling habitat, bears must travel longer distances to access prey, contributing to longer fasting periods. Also, the additional energy expended due to increased travel will detrimentally contribute to lower body weight and reduced cub survival rates. FWS determined that these factors will lead to significant declines in the global polar bear population. In listing the polar bear as threatened, FWS considered climate change models developed by the International Panel on Climate Change and population models from the U.S. Geological Survey. Based on this information, FWS determined that increased global temperature and greenhouse gasses would negatively impact the amount of sea ice available, which in turn could reduce the polar bear population throughout the next century. However, though all polar bear populations will be adversely affected by the diminishing availability of sea ice during the foreseeable future, polar bear populations will unpredictably experience these negative impacts to varying degrees. Thus, FWS determined that the polar bear, at the time of the rulemaking, was not in imminent danger of extinction and should only be categorized as threatened.

The listing rule was challenged by various environmental organizations and other parties, including the Center for Biological Diversity (CBD), Greenpeace, the Natural Resources Defense Council (NRDC), Conservation Force, and the State of Alaska. Many plaintiffs, such as CBD, Greenpeace, and the NRDC, maintained that FWS's listing of the polar bear as threatened was arbitrary and capricious because the bear qualified for protection as an *endangered* species under the ESA. Other plaintiffs argued that the polar bear did not meet the threatened standard and was ineligible for ESA protection at all. In July 2011, the District Court for the District of Columbia found that, under the APA, FWS's decision was supported by sufficient evidence in the administrative record and, thus, was not arbitrary, capricious, or an abuse of discretion.

Administrative Procedure Act

Under the APA, actions taken by a federal agency, such as FWS, are reviewable by the district courts, which are authorized to hold unlawful and set aside federal agency

Photograph of polar bears courtesy of

actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[3] Based on this standard, agency action will be upheld if the agency "considered the factors relevant to its decision and articulated a rational connection between the facts found and the choice made."[4]

When reviewing federal agency action, a district court cannot substitute its judgment for that of the agency and must uphold the action if the agency's decision was reasonable. When FWS decisions are reviewed by the district court, the court defers to agency's expertise in wildlife conservation and habitat management. Though the court may initially consider the agency action to be rational, the APA requires the reviewing court to conduct an exhaustive review of the agency's decision.

Agency action will be deemed arbitrary if the agency relies on factors that Congress did not intend the agency to consider, fails to consider significant aspects of the issue, offers explanations for the final decision that contradict the evidence on the record, or makes an entirely implausible decision. Judicial review of agency action requires a two-step method of review, as outlined by the Supreme Court in *Chevron, U.S.A., Inc. v. NRDC*. First, the court must determine if Congress has been silent or ambiguous regarding the issue at hand. If Congress has definitively provided an answer to the issue requiring interpretation, then the agency must adhere to the Congressional intent. If Congress has not addressed the issue, then the reviewing court must determine if the agency's decision is based on a reasonable construction of the statute. If the agency's decision is reasonable, then the reviewing court will defer to the agency's expertise.

FWS's Polar Bear Listing

FWS's decision to list the polar bear as threatened under the ESA is an example of agency action reviewable by the district court under the APA. The plaintiffs argued that the listing was arbitrary and capricious because FWS inaccurately interpreted the ESA's listing standards, FWS failed to consider specific listing factors identified under the ESA, and FWS's decision making process was deficient based on standards outlined in the ESA.

CBD and other plaintiffs contended that the polar bear actually qualified for endangered status under the ESA; thus, FWS's listing of the bear as threatened was arbitrary. FWS indicated that listing the polar bear as threatened was reasonable because the text and legislative history of the ESA mandated that only species imminently at risk of extinction could be designated as an endangered species. In November 2010, when the case originally came before the district court, the court determined that the ESA's language "in danger of extinction" was ambiguous under *Chevron* and remanded the case to FWS for an explanation of its interpretation of the term.

After reconsidering the issue, FWS indicated that a species is endangered only if it is "on the brink of extinction in the wild."[5] Only in four circumstances will this standard be met: when the species faces certain extinction due to a catastrophic threat, when the species is particularly vulnerable since it is only found in a limited geographic area, when a once-prevalent species has been reduced to a critically low population or when its range has been extremely restricted, and when a species has suffered repeated and long-term reductions in its population and range. Since the polar bear is widely distributed in nineteen global populations, only one of which shows significant population decline, the species does not fall into these categories; thus, the polar bear was listed as threatened.

CBD countered that the polar bear should be considered endangered because the best available science, including climate and population models, demonstrated that the polar bear met the "in danger of extinction" standard. However, the district court determined that "the Service's definition of an endangered species, as applied to the polar bear, represent[ed] a permissible construction of the ESA and must be upheld under step two of the *Chevron* framework."[6] In reaching its decision, the court found that FWS acted within its discretion to weigh the facts on the record and conclude that, at the time of the listing, the polar bear was not, in fact, endangered under ESA standards. Since the court cannot substitute its judgment for that of the agency when the agency's actions are reasonable, the court refused to disturb the agency's decision.

The court also rejected the challenge that the polar bear should not have been listed at all under the ESA. To be listed as "threatened" under the ESA, the species must be likely to become endangered within all or part of its range in the foreseeable future. The plaintiffs contended that FWS not only clearly failed to establish that the polar bear would be likely to become endangered but also arbitrarily designated the "foreseeable future" as the next forty-five years. Though plaintiffs argued that FWS should have demonstrated that the polar bear was between 67-90% likely to become an endangered species in the future, the court rejected this argument, noting that, since neither Congress nor FWS had clearly defined

USFWS, Steve Hillebrand, photographer.

the term "likely," the FWS was not required to adopt the 67-90% standard developed in the climate change models upon which it relied in listing the polar bear. Also, plaintiffs argued that FWS should have relied on a timeframe shorter than forty-five years; however, the court found that, since neither Congress nor FWS had defined the number of years comprising the "foreseeable future," FWS was free to adopt this standard if it felt that the time period represented the best available science and that climate change and population projections became too speculative beyond that point.

Conclusion

In upholding FWS's decision to list the polar bear as a threatened species under the ESA, the District Court for the District of Columbia emphasized that, under the APA, the court must defer to reasonable administrative decisions made by a federal agency. Though certain environmental groups failed to secure more stringent protections for the polar bear, the threatened listing provides a heightened level of protection for this species, which may be at risk of extinction in the future.

Endnotes

1. Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008).
2. *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 08-764. 2011 U.S. Dist LEXIS 70172, at *18 (June 30, 2011) [hereinafter *In re Polar Bear Listing*].
3. 5 U.S.C. § 706(2)(A).
4. *In re Polar Bear Listing*, 2011 U.S. Dist LEXIS 70172, at *41 (quoting *Keating v. FERC,* 569 F.3d 427, 433 (D.C. Cir. 2009)).
6. *Id.* at *50.
7. *Id.* at *73-4.

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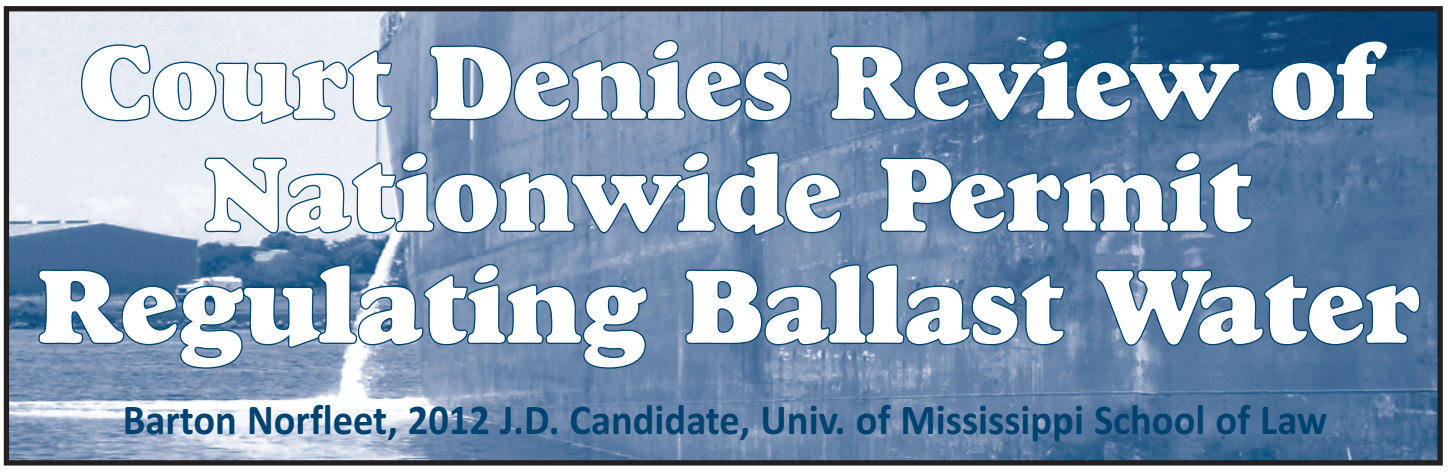
expressly held open the possibility that new evidence regarding the Asian carp threat and inadequate government response could invite future court action.

Conclusion

Despite the Seventh Circuit's ruling that insufficient evidence exists to reverse the district court's denial of the preliminary injunction, it eliminated many legal obstacles and allowed the States to continue their public nuisance claim. This ruling was a small victory for the States, and it was considerably more favorable than the district court's ruling. The state attorney generals involved are now enlisting other states in their efforts to restore a natural hydrological separation between the Great Lakes and Mississippi River Basins.[12]

Endnotes

1. Michigan v. U.S. Army Corps of Eng'rs., No. 10–3891, 2011 WL 4351356 (7th Cir. Ill. Sept. 13, 2011).
2. *Id.* at *1 (noting the Mississippi River and Great Lakes connect in locations from Minnesota to New York, and the CAWS additionally connects Lake Michigan to the Mississippi watershed through four non-navigable tributaries).
3. Asian Carp Regional Coordinating Committee, *Monitoring and Rapid Response Plan for Asian Carp in the Upper Illinois River and Chicago Area Waterway System*, May 2011, http://www.asiancarp.org/wp-content/uploads/2011/05/MRRWG-MRRP-May-2011-Final.pdf.
4. 278 U.S. 367 (1929).
5. Michigan v. Illinois, 130 S.Ct. 1166 (2010) (prelim. injunction denied), 130 S.Ct. 1934 (2010) (renewed prelim. injunction denied); Wisconsin v. Illinois, 130 S.Ct.1166 (2010) (prelim. injunction denied); Michigan v. Illinois, 130 S.Ct. 2397 (2010) (motions to reopen and for supplemental decree denied).
6. Michigan v. U.S. Army Corps of Eng'rs., No. 10-CV-4457, 2010 WL 5018559, at *1 (N.D. Ill. Dec. 2, 2010).
7. *Id.* at *1.
8. 5 U.S.C. § 702.
9. Michigan v. U.S. Army Corps of Eng'rs., No. 10–3891, 2011 WL 4351356, at *6 (7th Cir. Ill. Sept. 13, 2011).
10. *Id.* at *7.
11. *Id.* at *2.
12. John Sellek, Joy Yearout, *Schuette Building National Coalition against Aquatic Invasive Species*, Aug. 31, 2011, http://www.michigan.gov/ag/0,4534,7-164-46849-261562—,00.html.



Photograph courtesy of Smithsonian Environmental Research Center.

Court Denies Review of Nationwide Permit Regulating Ballast Water

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On July 22, the United States Court of Appeals for the District of Columbia denied a challenge to the Environmental Protection Agency's nationwide permit regulating the incidental discharges from vessels, including the discharge of ballast water, into waters of the United States.[1] The final Vessel General Permit (VGP) included state certification requirements that were not in the original VGP draft.[2] The Lake Carriers' Association (LCA), a collection of plaintiffs consisting of commercial ship owners and operators, claimed that the EPA's inclusion of the state certification requirements violated the Administrative Procedure Act (APA). The court denied the claim, finding that the Agency was not authorized to amend or reject the state conditions.

Background

Prior to a 2008 court ruling, an EPA rule made certain incidental discharges from vessels exempt from the Clean Water Act (CWA). These exempted discharges included "sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel."[3] However, in 2008 the Ninth Circuit held that the EPA had overstepped its authority, and the court voided the EPA's discharge exemptions as of February 6, 2009.[4] The EPA responded by creating the VGP, which included the exempted discharges in all U.S. waterways.

LCA's Challenges

The LCA, on behalf of all the trade associations involved, filed a petition arguing that the EPA improperly included the state requirements in the VGP. The plaintiffs first claimed that the VGP was invalid because the EPA had not allowed a proper notice and comment period regarding the final VGP decision.[5] The LCA next claimed that the EPA acted in an arbitrary and capricious manner by not examining the harmful effects that the state certification requirements might have on the trade associations. The LCA claimed that the differing compliance standards in each state would hinder vessel operations as they move through interstate waters. Finally, the LCA argued that the EPA did not follow the Regulatory Flexibility Act (RFA),[6] which requires an assessment of how the permit would affect small businesses that would have to comply with the new permit assessments.

Notice and Comment of State Conditions

In response to the LCA's first challenge, the EPA argued that § 401(a) of the CWA allows it to skip the notice and comment period in relation to state certification requirements, because the states, not the EPA, are responsible for deciding whether or not to hold public hearings in regards to state certification programs in their own waters.[7] The court agreed, noting that the authority to amend or change state certifications can only be derived from states themselves, so any notice or comment period would not have resulted in a different outcome.

The EPA also claimed that it should be excused from requiring the notice period due to a regulation which allows the exemption of this procedure if the statute or procedure "plainly expresses a congressional intent to depart from normal APA procedures."[8] The court found this argument without merit, emphasizing that a state's comment and notice period does not meet the "plain congressional intent" standard.

The LCA also argued that the CWA required the EPA to handle all certifications for permits regarding mobile point sources (such as vessels) with discharges in multiple states; therefore, the VPG violated the Act by allowing individual states to regulate these discharge certificates themselves, stripping the EPA of its expressly given statutory regulatory power.[9] The court noted that

this might have been a valid point of contention, but the LCA had waived its right to argue it by not expressing it in the comment and notice period for the original draft of the VPG.[10]

Regulatory Flexibility Act

In response to the final claim against the EPA in regards to violation of the RFA, the EPA responded by stating that the VGP "is not likely to have a significant economic impact on a substantial number of small entities."[11] However, the court found that this claim was waived because there was in fact a notice and comment period in which the matter could have been addressed.[12]

Conclusion

The court found that it was unnecessary for the EPA to review the VGP. However, the court did recognize the conflicts which the LCA asserts will arise from new VGP state certification requirements.

> *If they believe that the certification conditions imposed by any particular state pose an inordinate burden on their operations, they may challenge those conditions in that state's courts. If they believe that a particular state's law imposes an unconstitutional burden on interstate commerce, they may challenge that law in federal (or state) court. And if neither of these avenues proves adequate, they are free to ask Congress to amend the CWA, perhaps by reimposing the exemption for incidental vessel discharges.*[13]

Therefore, the shippers may still challenge the VGP; however, they must choose another arena in which to fight their battle.

Endnotes

1. Lake Carriers' Ass'n v. EPA, 2011 U.S. App. LEXIS 14996 (D.C. Cir. July 22, 2011).
2. 73 Fed. Reg. 79,473 (Dec. 29, 2008).
3. 40 C.F.R. § 122.3(a)
4. Northwest Envtl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008).
5. 5 U.S.C. § 553.
6. 5 U.S.C. § 601 *et seq.*
7. 33 U.S.C. § 1341(a).
8. Asiana Airlines v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998).
9. Meline MacCurdy, *Vessels Required to Meet State as Well as Federal Permit Conditions for Incidental Wastewater Discharges*, MARTIN LAW (Sept. 6, 2011), http://www.martenlaw.com.
10. 33 U.S.C. § 1341(a).
11. 73 Fed. Reg at 79,481; *see* 5 U.S.C. § 605.
12. MacCurdy, *supra* note 9.
13. *Id.*

Weird Science?

After an extensive three-week long search, a 21-foot long saltwater crocodile was captured alive on September 4th in the Philippines. The crocodile, weighing in at 2,369 pounds, has been accused of injuring several people and killing two; however, the accuracy of these allegations cannot be determined without killing the animal, which has been named Lolong in the days since its capture. The largest saltwater crocodile on record was listed at 17.91 feet long and was captured in Australia, and federal officials are presently working to determine if this crocodile can now claim the title. Herpetologists and biologists doubt that the crocodile is actually as large as initial reports have claimed, noting that no crocodile has ever been measured that was truly longer than 18 feet.

Scientists have recently named a new species of bird in the United States: Bryan's shearwater. Unfortunately, however, scientists are concerned that the species may already be extinct. This is the first new bird species to be named in the U.S. since the discovery of the po'ouli in Hawaii in 1974. One previous specimen of Bryan's shearwater was discovered and photographed in the early 1960's at Midway Atoll, in the Hawaiian islands. Bryan's shearwater is the smallest of the 21 living shearwater species and is particularly identifiable because of its long, black tail. Because biologists have dedicated significant amounts of time to surveying the Hawaiian islands for various bird species, the fact that Bryan's shearwater has thus far been unnoticed indicates to scientists that the bird is extremely rare. Because only two have been sighted since its original discovery in 1963, scientists have articulated two possibilities: Bryan's shearwater is either an extremely rare species or it is very near the brink of extinction.

Photograph of saltwater crocodile courtesy of Molly Ebersold.

U.S. Supreme Court Holds CAA Displaces Federal Common Law

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In 2004, eight states, three private land trusts, and New York City filed two separate lawsuits against five electric power companies whom they contend are the nation's most significant emitters of carbon dioxide. The plaintiffs argued that the companies' carbon dioxide emissions, amounting annually to 650 million tons, contributed to global warming and constituted a nuisance under tort law.

On June 20th, the U.S. Supreme Court held that the Clean Air Act (CAA) and the Environmental Protection Agency's implementation of the Act displace the federal common law right of private plaintiffs to seek the reduction of carbon dioxide emissions from power plants.[1] The Court ruled that should the EPA fail to limit emissions from such plants under the CAA, private plaintiffs may then petition for an administrative rulemaking, the result of which is reviewable in federal district court. The Supreme Court's holding essentially provides an administrative remedy for the plaintiffs seeking enforcement of the CAA.

Background

Two separate complaints filed against the Tennessee Valley Authority, American Electric Power Company, Inc., Southern Company, Xcel Energy, Inc., and Cinergy Corporation in July 2004 alleged that the companies' collective annual emissions, amounting to 25 percent of the nation's electric power emissions, constituted a public nuisance. In the first complaint, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and New York City contended that the carbon dioxide emissions threatened public lands, infrastructure, and public health by adversely contributing to global climate change. In the second lawsuit, three land trusts, including Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire, alleged that these companies' emissions would contribute to climate change, which in turn would modify or completely destroy the habitats for plants and animals located on the trusts' lands. By playing a significant role in the global warming phenomenon, the electric companies, according to the complaints, violated both interstate nuisance law, a federal matter, and state tort law by causing a substantial and unreasonable interference with public rights. Both lawsuits sought injunctive relief from the Southern District of New York in the form of an annual emissions cap for domestic power plants.

The district court determined that both suits against the electric companies raised nonjustifiable political questions; however, the Second Circuit reversed this opinion, finding that the plaintiffs had standing to sue under Article III of the U.S. Constitution and that the political question doctrine did not bar these suits from going forward.[2] The Court of Appeals held that the CAA did not displace federal common law, noting that, because the EPA had not, at that time, attempted to regulate greenhouse gas emissions, the effect that such regulation would have on the plaintiffs' allegations was too speculative. The U.S. Supreme Court granted certiorari.

Displacement of Federal Common Law

In *Erie Railroad Company v. Tompkins*, the Supreme Court denied the existence of general federal common law; however, subsequent cases recognized that a federal common law had emerged with regards to areas of national concern.[3] One such area of national concern is environmental protection, and federal courts may create common law where necessary to effectively provide adequate safeguards for the environment. However, federal courts remain reluctant to create common law where state law supplies an adequate rule of decision. The court found that because eight states had joined in the plaintiffs' nuisance claim against the electric companies, choosing the law of one state in particular would not result in an appropriate decision.

The Supreme Court determined that it does not have the same power to create law that Congress possesses. If and when Congress legislatively addresses a

topic that previously fell within the scope of federal common law, Congress effectively eliminates the need for rules established by federal common law. For instance, Congress enacted the Clean Air Act and delegated its authority to the EPA to implement air quality regulations. Accordingly, the CAA and the authority delegated to the EPA displace the federal common law right of a private plaintiff to seek the reduction of a power plant's greenhouse gas emissions. In *Massachusetts v. EPA*, the Supreme Court held that the CAA authorized the EPA to regulate greenhouse gas emissions from new motor vehicles; accordingly, private plaintiffs have no need to rely on the court system and federal common law to regulate carbon dioxide and other greenhouse gas emissions.[4]

However, should the EPA fail to establish regulations for certain emissions, private parties have the right to petition for rulemaking to require the EPA to set emissions standards for these pollutants. At present, as required by the ruling in *Massachusetts v. EPA*, the EPA is engaged in a rulemaking process to establish standards for emissions by power plants, which is the same relief the plaintiffs sought in the present case. Since the CAA provides the same result that the plaintiffs sought under federal common law, the Supreme Court determined that, even though the EPA has yet to establish standards for greenhouse gas emissions, federal common law is displaced by the CAA. The Court noted that the EPA, as an expert agency with regard to air pollution regulation, was far better suited to regulate greenhouse gas emissions than federal judges; therefore, the EPA, rather than federal judges sitting in each judicial district, should be the entity charged with establishing emissions standards for carbon dioxide. Accordingly, the Supreme Court overturned the ruling of the Second Circuit, which indicated that federal judges had the authority to limit greenhouse gas emissions.

Conclusion

In reaching the decision that the CAA displaces the federal common law right for private plaintiffs to seek reductions in power plants' carbon dioxide emissions, the Supreme Court split 4-4, with Justice Sotomayor recusing herself after appearing on the Second Circuit panel that had previously decided the case. Because the Court was evenly split, the Second Circuit ruling that federal courts have jurisdiction over nuisance claims arising from greenhouse gas emissions was not overturned; therefore, federal courts in the Second Circuit may continue to hear similar nuisance claims from private plaintiffs. This ruling is not binding on the other Circuit Courts of Appeal, and because the Supreme Court has not directly spoken on the matter of jurisdiction, the question as to whether federal courts have proper jurisdiction over this matter remains undecided in courts outside of the Second Circuit.

Because the Second Circuit originally determined that federal common law governed the plaintiffs' nuisance claims, the Court of Appeals and the Supreme Court never reached the plaintiffs' alternative cause of action under state tort law. Since the Supreme Court held that the Clean Air Act displaced federal common law, the existence of a state tort action for nuisance depends entirely on whether the federal CAA preempts state law causes of action. On remand, the Second Circuit must determine whether the plaintiffs' state tort claims for nuisance will be preempted by federal law.

Endnotes

1. Am. Elec. Power v. Conn., 564 U.S. —- (2011).
2. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 331 (2d Cir. 2009).
3. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
4. Massachusetts v. EPA, 549 U.S. 497 (2007).

Photograph courtesy of US EPA.

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The University of Mississippi
THE SANDBAR
Sea Grant Law Center
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848

Littoral Events

Appalachian Public Interest Environmental Law Conference

Knoxville, Tennessee
October 20-23, 2011

The APIEL conference features a series of workshops led by lawyers activists, and scientists with a goal of exchanging information, sharing skills, and fostering collaboration. The conference will look at the region's most pressing ecological problems, as well as the underlying laws, policies, and institutional dynamics. Topics include: enforcement of the Clean Water Act; a look at legal implications of emerging energy technologies; and, water quality laws. To register, please visit https://sites.google.com/site/apiel-conference/ .

Shape of the Coast

New Bern, North Carolina
November 4, 2011

The 2011 Shape of the Coast will provide an overview of legal and coastal issues for legal practitioners, researchers, state and local government managers, as well as students. Topics include "ecosystem services" as a means to manage coastal resources, the challenges presented by state and federal cuts to state coastal regulatory programs, developments in state and federal case law affecting coastal resources, and a discussion of estuarine concerns. The program is co-sponsored by NC Sea Grant; the NC Coastal Resources Law, Planning and Policy Center; and the University of NC School of Law. Please visit www.law.unc.edu/cle/ to register.

The ABA 30th Annual Water Law Conference

San Diego, California
February 22-24, 2012

The Water Law Conference is targeted towards lawyers, engineers, policy makers, and water managers with interest in the protection, development, and allocation of water rights and water resources. It will be of value to all persons involved in water right issues, including those with private, municipal, agricultural, and tribal water rights. The conference is open to any interested persons, and is not limited to lawyers. For more information, visit http://www.americanbar.org/groups/environment_energy_resources/events_cle/wl.html.